

87-2122<sup>(1)</sup>

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
CLERK

NO. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE UNITED STATES  
SEPTEMBER TERM, 1988

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LEWIS O. FERGUSON, Petitioner

v.

Mildred Berry and

NORFOLK SOUTHERN CORP., Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

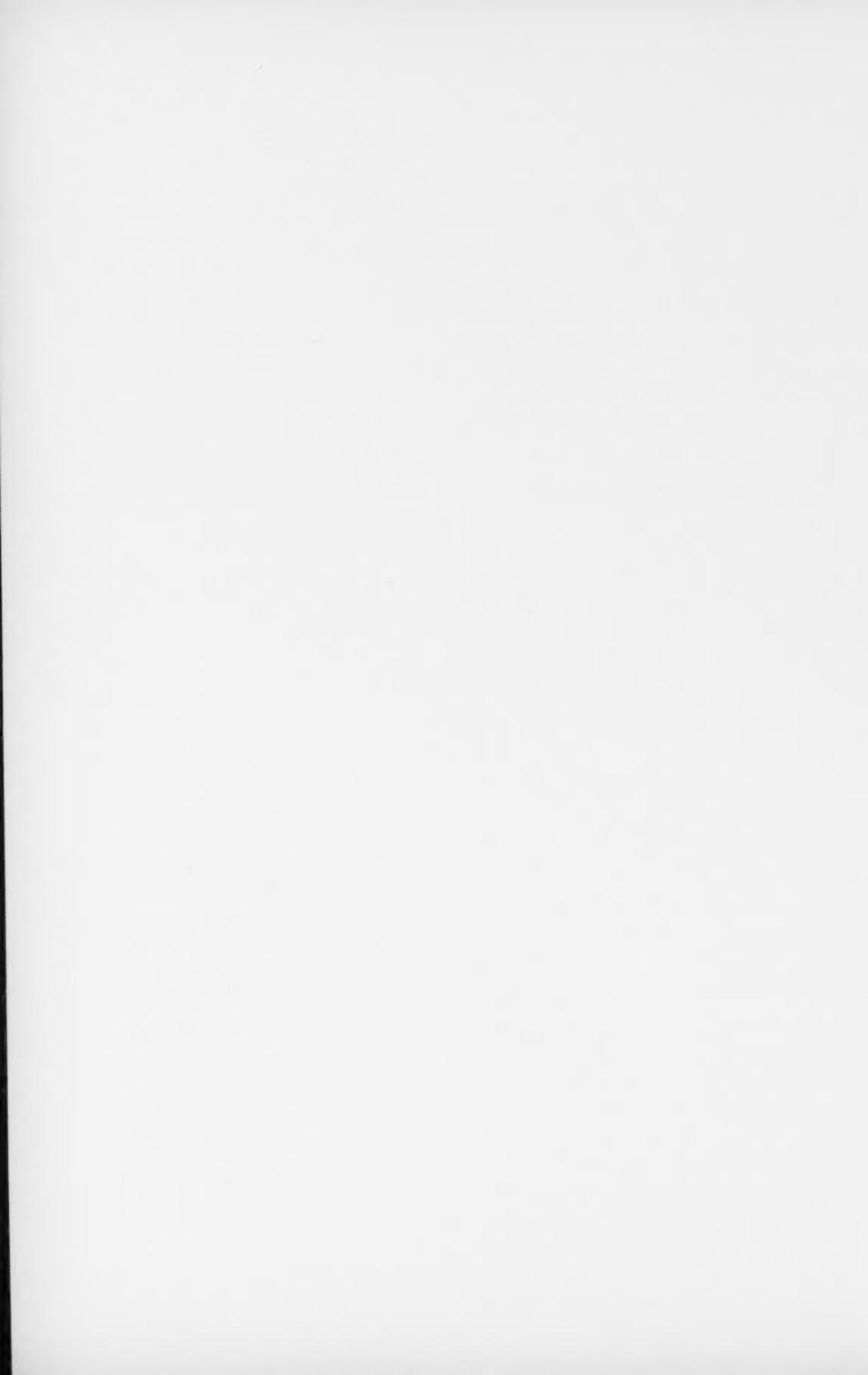
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## QUESTIONS PRESENTED FOR REVIEW

1. Can railroad workers(defendant)be tried in State Court for violations of State Law and did District Court error when it refused to mandate case to State Court?
- 2.Are Railroad workers exempt from State Laws and exempt from being tried in State Courts?
- 3.Is it unlawful for District Court to deprive Plaintiff of access to trial in State Court, against defendant?
- 4.Does Plaintiff have a constitutional right to pursue civil action in State Court for violations of State Court?
- 5.Did District Court violate Plaintiffs constitutional rights when it removed this action from State Court, refused to mandate it back to State Court, entered summary judgment

when interrogatories and request for production of documents have not been properly answered by defendants?

6. Did District Court error in entering Summary judgment AFTER defendant had admitted (in interrogatories) guilt to making slander statements?

7. Did District court error and fail to follow Federal Judicial Procedure and Rules?

8. Does District court have jurisdiction in this action that was filed in State Court against a citizen of the State?

9. Does National Rwy. Adjustment Bd. resolve unlawful conduct/constitutional matters and violations of State Law?

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TABLE OF CITATIONS

Andrews v. L&N R.R.:406 U.S. 320(1972)

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Choate v. L&N R.R.: 715 F.2d 369, 371-72  
(7th Cir. 1983)

Jim Buell v. Santa Fe R.R. : U.S. SUPREME  
COURT decision, dated March 1987.

IN THE SUPREME COURT OF THE UNITED STATES  
SEPTEMBER TERM, 1988 - NO. 87-3116

LEWIS O. FERGUSON, Petitioner

v.

Mildred Berry, and

Norfolk Southern Corp., Respondants

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS , FOR THE  
FOURTH CIRCUIT

The Petitioner, LEWIS O. FERGUSON respect-  
fully prays that a writ of certiorari be

issued to review the decision of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the U.S. District Court, that this civil action is a minor dispute within the exclusive jurisdiction of the Nat'l. R.R. Adj. Bd. Judgment dated and entered on June 30, 1987.

#### OPINION BELOW

The Court of Appeals entered its decision on Dec. 30, 1987, refused Plaintiffs Petition for rehearing on Jan. 26, 1988. Court of Appeals affirmed judgment on reasoning of District Court(Appendix A). Copy of Appeals Court denial for rehearing is attached as Appendix B.

#### JURISDICTION

Jurisdiction is invoked under Title 28 of U. S. Code and Rules of the Supreme Court.

## CONSTITUTIONAL PROVISION

Constitutional guarantee which allows a citizen(Plaintiff) access to State Courts and to charge a citizen or Corporation with violations of State Law. Also, Plaintiffs right to protection under Laws of Virginia.

## STATEMENT OF THE CASE

District Court has no jurisdiction on this case which was filed with Circuit Court for the City of Roanoke, Virginia.

On Feb. 7, 1986 in the City of Roanoke, VA., Mildred Berry(official of Norfolk Southern) did commit slander against Plaintiff, violating The Code of Virginia, Sec.18.2-416.

Defendant acted with reckless disregard for the harm that her remarks would cause to Plaintiff and his wife. Without provocation Berry made following remarks showing anger



and lack of respect for Plaintiff. This was done in presence of Mr. Fred Moorman. Statements made by Berry:

1. "You wrote a letter to Harold Hall and it was a lie".
2. "Your wife wrote a letter to Harold Hall and it was a lie."
3. "You wrote a letter to Bill Butts and it was a lie."
4. "You use your evenings to write letters that are half-truths and lies."

On Jan. 3, 1987 Plaintiff filed Motion for Judgment in the Circuit Court for the City of Roanoke, VA. citing violation of the Code of Virginia and requesting damages agsint defendants. Berry and Norfolk Southern Corp. are residents of Virginia. District Court took case from Circuit Court. District Court

entered summary judgment for defendants on June 30, 1987, while at the same time Plaintiffs interrogatories and request for production of documents had not been properly, if at all, answered by defendants. Plaintiff believes District Court violated Federal Rules of Procedure. Summary judgment is unlawful. Plaintiff filed Notice of Appeal to the U.S. Court of Appeals, Fourth Circuit, on July 21, 1987. Court of Appeals rendered judgment on Dec. 30, 1987. Jan. 7, 1988 Plaintiff mailed Petition for Rehearing to Court of Appeals. Appeals Court denied Petition for Rehearing on Jan. 26, 1988.

ARGUMENT FOR GRANTING WRIT

District Court has no jurisdiction. District Court violated Rules of Procedure. Under State law, Plaintiff has a right to pursue this case in State Court.

It is inconceivable that Congress intended that a citizen (railroad worker or not), not be allowed to recover damages for violations of state laws. The Nat'l. railway adjustment Bd. has no authority to handle violations of State Laws nor authority to award damages, as sought by Plaintiff. Railroad workers are citizens of their State, therefore, they must be given all the rights that are available to all other citizens. District Court must NOT be allowed to excuse and protect railroads and their officers from prosecution under State Laws, nor to make the ludicrous judgment that all nefarious actions by Railroads and their officers, hidden and forgiven by placing their acts under the Railway Labor Act. Plaintiff has been told, by his Labor Union, that the Union has no authority or ability to handle this case or any violation

of State Law, such cases cannot be handled by Nat'l. R.R. Adj. Bd. Also, Judge Turk ruled "in that there is no diversity of citizenship among the parties, any State claims should be brought, if at all, in the appropriate State Court,"(Memorandum Opinion, Civil Action No. 85-0178 U.S. District Court, Roanoke Division, Burke B. Carter, Plaintiff v. Doris J. Puryear and Norfolk and Western Rwy.)

In view of the above, we see that Judge Turk disputes his own rulings by ruling one way on the above case and then ruling just the opposite, the case at hand here. District Court admits it has no jurisdiction in this case. Neither does Nat'l R.R. Adj. Bd. Congress did not intend for RLA to cover such cases or to exclude anyone from State Laws.

Derogatory statements about Ferguson in  
Appendix C are NOT TRUE.

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A P P E N D I X

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APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT                      NO. 87-3116

LEWIS O. FERGUSON, Plaintiff - Appellant  
v.

Mildred Berry, et al, Defendants-Appellee

Appeals from the United States District Court  
for the Western District of Virginia, at Roan-  
oke, VA. James C. Turk, Chief District Judge.  
(C/A NOS. 87-98(NO. 87-3113), 87-68(NO. 87-  
3115); 87-87(NO. 87-3116)).

Submitted: Nov. 30, 1987    Decided: Dec. 30, 1987

Before PHILLIPS and ERVIN, Circuit Judges, and  
BUTZNER, Senior Circuit Judge.

(LEWIS O. FERGUSON, Appellant Pro Se.

William Fain Rutherford, Jr., William B. Poff.  
Woods, Rogers & Hazlegrove, for Appellees.)

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PER CURIAM:

A review of the record and the district courts opinion discloses that this appeal from that court's order finding Plaintiff's claim to be minor disputes within the exclusive jurisdiction of the Nat'l. R.R. Adj. Bd. is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. FERGUSON v. Roanoke Valley Psychiatric Center, C/A Nos. 87-98, 87-68, 87-87 (WD. VA. June 30, 1987). AFFIRMED

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT                      NO. 87-3116

Filed Jan. 26, 1988, U.S. Court of Appeals,  
Fourth Circuit

LEWIS O. FERGUSON, Plaintiff - Appellant  
v.

Mildred Berry, et al, Defendants-Appellees

On Petition for Rehearing

Upon consideration of the Appellant's pro se petitions for rehearing, IT IS ORDERED that the petitions for rehearing are denied. Entered at the direction of Judge Ervin, with the concurrence of Judge Phillips and Senior Judge Butzner.

for the Court

John M. Greacen  
Clerk

APPENDIX "B"

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

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LEWIS O. FERGUSON,	)	
Plaintiff	)	Civil Action
v.	)	No. 87-0068
Norfolk Southern Corp.,	)	
Defendant	)	

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LEWIS O. FERGUSON,	)	
Plaintiff	)	Civil Action
v.	)	No. 87-0087
Mildred Berry and	)	
Norfolk Southern Corp.,	)	
Defendant	)	

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LEWIS O. FERGUSON,	)	
Plaintiff	)	Civil Action
v.	)	No. 87-0098
Roanoke Valley Psychi-	)	
atric Center, Walter B.	)	
Blair, and Norfolk Sou-	)	
thern Corp., Defendants	)	

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O R D E R

For the reasons stated in the accompanying



Memorandum Opinion, it is hereby

O R D E R E D that summary judgment be entered on behalf of the defendants in each of the three cases.

This is a final order. The Clerk is directed to strike these cases from the court's active docket.

ENTER: This 30th day of June, 1987.

James C. Turk  
CHIEF U.S. District Judge

MEMORANDUM OPINION

By: James C. Turk

Chief U.S. District Judge

These three cases have come before the court on defendants' motions to dismiss.<sup>1</sup> All three cases arise out of one series of disputes between the plaintiff and his employer, the Norfolk Southern Corp. The court finds that all three cases involve minor disputes that fall under the exclusive jurisdiction of

the Nat'l. R.R. Adj. Bd. and on that basis will grant summary judgment in favor of the defendants in all three cases.      BACKGROUND

The Plaintiff, Lewis O. Ferguson is a long-time employee of the Norfolk Southern R.R. (NS). During the times relevant to these actions, he was a clerical employee at the NS Tariff Bureau in Roanoke, VA. Also at those times, he was a member of the Brotherhood of Railway Airline and Steamship Clerks, Freight-handlers Express, and Station Employees (BRAC), the collective bargaining agent for NS employees. Additionally, Ferguson served on BRAC's "local protective committee," a position that entailed his reporting violations of work rule violations to BRAC and its local chairman.

In August 1985 the railroad began receiving numerous complaints from employees at the

Tariff Bureau. Some of these were charges by Ferguson against his co-workers. The others were complaints against Ferguson by other employees at the Tariff Bureau. The volley of charges and countercharges between Ferguson and his co-workers was repeated so frequently that the railroad police department handled them in one ongoing investigation of personnel within the Tariff Bureau. The crux of Ferguson's numerous allegations was that his fellow employees were engaged for unknown reasons in a deliberate attempt to harass and annoy him. The specific incidents he described ranged from people tampering with his desk and anonymous threatening phone calls to a man threatening him with a knife. While the record alludes to only one or two specific allegations by Ferguson's co-workers, it indicates that their ongoing concern was Ferguson's

repeated interrogation of them to discover the identity of his tormentor. One specific allegation, which is in the record, is that on January 24, 1986 Ferguson threatened to bring a gun to work. Ferguson disputes that allegation. He claims it was a result of a co-worker's misunderstanding of a joke he made about terrorism.

Following the gun incident, on Feb. 7, 1986 railroad police officer F.D. Moorman interviewed Ferguson in the presence of Ferguson's supervisor, Ms. Mildred A. Berry. During the hearing Berry allegedly commented about Ferguson's repeated written complaints about his co-workers. According to Ferguson, she accused him and his wife of lying and making false accusations to NS supervisory personnel.

Concurrent with the dispute between Berry and Ferguson concerning the interview with

Moorman, the animosity between Ferguson and his co-workers precipitated a second dispute. On Feb. 27, 1986, Berry advised Ferguson that she had scheduled him to see Dr. W.B. Blair, a local psychiatrist. Dr. G.W. Ford, the MS Medical Director had arranged for Ferguson and another Tariff Bureau employee to visit Dr. Blair as a result of the ongoing problems between Ferguson and the other man. Ferguson initially refused to consent to the psychological exam. However, on Feb. 7th he was given a release from duty and he voluntarily left work to go to Dr. Blair's office. At the outset of the appointment, Ferguson handed Dr. Blair a letter stating that he was reporting against his will, that he would not pay for the appointment, and that he refused to consent to the release of any report of the evaluation. Although Dr. Blair advised Ferguson that he

was free to leave, Ferguson agreed to stay because he had been sent there at the order of his employer. As Dr. Blair commenced to examine Ferguson it became clear that Ferguson would not furnish answers sufficient to serve as the basis for an accurate psychological evaluation. It is disputed whether or not Ferguson's evasiveness was the result of his intentional uncooperativeness. After the brief, unfruitful examination Dr. Blair notified Dr. Ford that as a result of Ferguson's useless responses he was unable to submit to NS a mental status evaluation of Ferguson.

Ferguson's visit with Dr. Blair ended at 12:17 p.m. yet he did not return to his office on that day until 3:00 p.m. When he finally did return, Berry asked him about the delay. Although it is unclear exactly what Ferguson said to her, she interpreted his response as

insolent and disrespectful. On Feb. 18, 1986 pursuant to Rule 14 of the collective bargaining agreement between NS and BRAC, NS served Ferguson with notice of several charges against him: (1) dereliction of duty for failing to return promptly to work on Feb. 7; (2) insubordination for his insolence and failure to respond adequately to Berry's curiosity about his delay and; (3) insubordination for refusing to cooperate with Dr. Blair.

Following an investigation and a hearing, Ferguson was found guilty of insubordination and dereliction of duty. As a disciplinary measure, NS suspended Ferguson from work effective 4:50 p.m. on Feb. 12, 1986 and ending 8:00 a.m. on March 17, 1986. On Ferguson's behalf, BRAC appealed the suspension to Public Law Board 3751, which is convened under the authority of the Railway Labor Act 45



U.S.C - 153. That case is still under the Board's consideration.

Following a second refusal to submit to an examination by Dr. Blair, MS referred Ferguson to a second psychiatrist, Dr. Wm. D. Clarkson. Ferguson did cooperate with Clarkson. Subsequently, Dr. Clarkson submitted to Dr. Ford an in depth evaluation of Ferguson. He diagnosed Ferguson as exhibiting "(P)ersonality disorder, mixed with passive aggressive and paranoid features." Dr. Clarkson concluded that Ferguson was likely not to be a threat to himself or to his co-workers, but he advised the railroad to let Ferguson transfer to another position away from the employee with which he had the most conflict. About two and a half weeks after Dr. Clarkson submitted his report, Ferguson wrote to Clarkson accusing the doctor of baiting him,



misdiagnosing him, and of intentionally misrepresenting his condition in order to make him "look bad."

Case No. 87-68

In the first action, Ferguson sues NS for the incidents surrounding the investigation by the railroad police, the accusations by Berry, and for his suspension following the visit with Dr. Blair. He alleges that those actions were in retaliation for his Union Activities and that they constitute a deprivation of his rights without due process of law.

Case No. 87-87

The second case, removed here from state court arises out of the comments Berry made during the interview with Ferguson and officer Moorman. Ferguson alleges that Berry's remarks were slanderous under Va. Code - 18.2-416. He asks for damages from NS and Berry to

compensate for the suffering and mental distress that the statements caused him.

Case No. 87-98

In the third suit, also removed from state court, Ferguson sues NS, Dr. Blair, and the Roanoke Valley Psychiatric Center(RVPC), the place where Dr. Blair leases office space. He alleges that NS had no just cause initially to refer him for psychiatric evaluation and that Dr. Blair lied to NS about his refusal to cooperate during the examination. He claims that these wrongful acts led in turn to his wrongful discipline and suspension. Finally, he accuses Dr. Blair of violating Va. Code 8.01-413 by failing to provide him with a copy of a psychological report that he believes Dr. Ford prepared.

## DISCUSSION

The defendants have offered several arguments in support of their motions to dismiss. The one that is most encompassing and that justifies dismissal of all three cases is that Ferguson's cases all involve minor disputes which, pursuant to the Railway Labor Act (RLA), 42 U.S.C. 152 et seq., are outside of the district court's jurisdiction. The RLA governs labor relations in the railroad industry. As part of its mandate, the RLA directs employers and employees in the railroad industry to resolve most job related disputes without recourse to the courts. 45 U.S.C. 152, 153. All disputes between a railroad and its employees that involve "the interpretation or application of agreements concerning rates of pay, rules, and working conditions" are to be resolved by the Nat'l. R.R. Adj. Bd (NRAAB)

42 U.S.C. 153. These disputes, referred to as minor disputes, are within the NRAB's exclusive jurisdiction. Federal court are therefore without power to resolve minor disputes. Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320, 325 (1972). Further, NRAB decisions over minor disputes are almost invariably final and may be reviewed or relitigated in courts only under the narrowest of circumstances. Union Pacific R. Co. v. Sheehan, 439 U.S. 89, 93-94 (1978). Unless the NRAB (1) fails to comply with the RRA; (2) fails to confine itself to the bounds of its jurisdiction or; (3) exhibits fraud or corruption, a court is powerless to review issues properly and previously brought before the NRAB. Id. at 93. Ferguson's actions against the R.R. for harassment and improper suspension in retaliation for Union activity and in his charges

against Dr. Blair and RVPC are minor disputes within the NRAB's exclusive jurisdiction.

Ferguson's characterization of NS's conduct as improper implies the existence, and violation, of certain duties and standards of behavior. The source of these duties and standards is the collective bargaining agreement.

"Since the NRAB has exclusive jurisdiction over disputes involving contractual interpretation of collective bargaining agreements between carriers and their employers, it follows that only the (NRAB) can determine the propriety" of NS's conduct. Choate v. Louisville & Nashville R.R. Co., 715 F.2d 369, 371-72(7th Cir. 1983). Although Ferguson argues that NS's anti-union animus and its retaliatory tactics take this case beyond the limits of a contractual minor dispute, in light of the NRAB's familiarity with contractual

disputes and its expertise in understanding a carriers duties under a collective bargaining agreement, there is, however, "no reason to believe that the (NRAB) could not adequately address and resolve a claim of pretextual discipline motivated by anti-union animus." Thacker v. Norfolk & Western Ry. Co., No. 84-1166, slip op. at 14(W.D. Va. July 29, 1985); quoting Local Union 808, Int'l. B'hood of Teamsters v. N&W R.R. Co., 576 F. Supp. 693, 7093 (D. Conn. 1983); see also, Morris v. Winston-Salem Southbound Ry. Co., No. 85-1894, slip op. at 6-7 (4th Cir., Nov. 5, 1986). The court is also convinced that the RLA is applicable to the case against Dr. Blair and RVPC, despite Ferguson's contention that they are outside NRAB's jurisdiction because they are not officially connected to the R.R. Ferguson's contact with Blair and RVPC was

at the direction of the R.R. as part of its investigation of internal departmental unrest. Dr. Blair made the allegedly false statements in the context of an NS investigation and hearing. Thus, the gravamen of the case against Blair and RVPC is the railroad's abuse of investigatory process, a matter substantially covered in the collective bargaining agreement and one within the NRAB's exclusive jurisdiction. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369-40(9th Cir.), cert. denied, 439 U.S. 930(1978). Finally, Ferguson is barred from litigating the issue of his discipline and suspension here because he is concurrently addressing the same issue in his appeal before the Public Law Board. Andrews, supra, 406 U.S. at 325. It is therefore clear that Ferguson's right to resort to Federal court to vindicate his wrongful

discipline claim is circumscribed by the RLA. The RLA also bars Ferguson's suit for defamation against Berry and NS. While defamatory statements are not covered specifically by the collective bargaining agreement between NS & BRAC, the fact that a claim is not expressly addressed by an agreement is immaterial for purposes of coverage by the RLA. Elgin J&E Ry. v. Burley, 325 U.S. 711, 723(1945).

Investigations of employee complaints are covered by the NS-BRAC agreement and are normal incidents of the employer-employee relationship. Majors v. U.S. Air, Inc., 525 F. Supp. 853, 857(D.Md. 1981). Any dispute arising out of such an investigation, including a charge of defamation, should fall within the NRAB's exclusive jurisdiction. See, e.g., Miller v. Norfolk & Western Ry. Co., No.83-3652, slip op. (N.D. Ohio 1984); Farley v.



Hayes, 112 L.R.R.M. 2298(S.D. Ill. 1982); Majors, supra, 525 F.Supp. at 853; Carson v. Southern Ry. Co., 494 F. Supp. 1104(D. S.C. 1979). Thus even if Berry did defame Ferguson when she remarked about him during officer Moorman's interview, then that issue can be resolved only by the NRAB. This court, however, is without jurisdiction to address that issue.

#### CONCLUSIONS

The actions that LEWIS O. FERGUSON has brought against NS, Mildred Berry, Walter Blair, M.D. and the Roanoke Valley Psychiatric Center are minor disputes which, under the provisions of the RLA, fall under the exclusive jurisdiction of the NRAB. Because the court is without jurisdiction to hear these claims, it will grant summary judgment in favor of the defendants. An order

consistent with this opinion will be entered  
on this day.

DATED: This 30th day of June, 1987.

James C. Turk

Chief U.S. District Judge

NOTE: The original writ of certiorari was  
on legal size paper and was notarized and  
mailed to this court on April 20, 1988.  
This booklet form is now submitted to the  
court as instructed by Francis J. Lorson,  
Chief Deputy Clerk, U.S. Supreme Court.

